United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942-43

No.....

PAUL DOUCHAN,
Petitioner and Appellant below,
vs.
UNITED STATES OF AMERICA,
Appellee below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion in the Circuit Court of Appeals of the Sixth Circuit was entered April 15, 1943, and is reported in *United States v. Paul Douchan,* 134 Fed. (not published at this date) and appears opposite page No. 150 in the certified record and proceedings furnished by the clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

II.

JURISDICTION

1. The date of the judgment of the Circuit Court of Appeals to be reviewed is April 15, 1943.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Act of February 24, 1933, c 119, U.S.C. Title 18, Section 688. Rules No. 11 and No. 13 of "Rules of Criminal Procedure after plea of guilty, verdict, or finding of guilt"—promulgated May 7, 1934. Article 1, Section 9 (Paragraph 3—Ex-Post Facto Law); Article 3, Section 1 and 2, and the 5th Amendment of the Constitution for the United States of America. Section 240 a of the Judicial Code as amended (U.S.C. Title 28, Section 347 a). Section 256 of the Judicial Code as amended (U.S.C. Title 28, Section 371).

3. Petitioner was charged with an offense against the United States on two counts—concealing on August 15, 1936 property from his trustee in Bankruptcy (R. 113-115) under Title 11, Section 52 (b1), effective as of August 17th, 1926, and required to stand trial for a multiplicity of offenses according to the theory of the Government's attorneys as reflected by the proceedings at the trial (R. 11-87) and the instructions of the Court (R. 87-97) under Title 11, Section 52 (b1 and 2) effective as of September 22, 1938, the latter act creating additional offenses greatly widening its scope and increasing the punishment and penalties. Petitioner was found guilty and sentenced on each count (R. 97-98). Motion to set aside verdict was denied by the trial Court. Upon appeal to the Circuit Court for the Sixth Circuit the judgment and sentence of the lower Court was affirmed and opinion filed April 15, 1943—all contrary to the provisions of the Fifth Amendment to the Constitution for the United States.

See Appendix for successive forms of Title 11, Section 52 (b).

III.

STATEMENT OF THE CASE

This has already been stated in the preceding petition under A (pp. 1-7) which is hereby adopted and by this reference made a part of this brief.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that a verdict based on either of two or more acts, one of which was not a crime when committed and two of which were not included in the indictment, should not be reversed.

V.

ARGUMENT

The jury's verdict of "guilty" in this case might have been based on a belief that the petitioner had committed any one of three offenses shown in the evidence and described in the instructions as a crime charged against the petitioner: (1) Concealment of assets from creditors; (2) a false oath (3) concealment of assets from the Trustee.

The first of these, concealment of assets from creditors, was not a crime at the time petitioner was alleged to have committed it. The crime or offense at that time—August 15, 1936—being concealment from creditors in composition.

Neither the first nor the second of these, the false oath, was charged in the indictment.

But all three were included in the evidence and all three were included in the instructions.

The jury's verdict of "guilty" might have been based on a belief that the petitioner had committed any one of the three.

Only the last of the three, concealment from the Trustee, was charged in the indictment. Only as to the last of the three was the petitioner protected against double jeopardy. Only as to the last of the three was petitioner notified of the accusation or given an opportunity to prepare to defend himself.

How did this happen?

It is obvious from the Court's reading the statute (11 U.S.C.A. 52 (b)) in its presently amended form, and from the Court's admission of a great deal of evidence relating to concealment from creditors, that the Court was not aware that the statute had been amended subsequent to the date of the crime charged in the indictment, nor that concealment from creditors in any bankruptcy proceeding was not a crime on that date. (See Appendix for successive forms of statute, Title 11, Section 52 (b).) The Court therefore conducted the case, and charged the jury, on the erroneous assumption that the defendant was also charged with concealing his assets from his creditors, and making a false oath in or relation to any proceedings under this Act.

The jury without benefit of hearing or reading the indictment, naturally assumed from the scope of the testimony and most of all, from the Court's instructions, that petitioner was also accused of concealing his assets from his creditors and perhaps of making a false oath.

The petitioner, unprepared to stand trial for matters of which he had not been accused, was found by the jury "guilty as charged."

Judge Allen of the Circuit Court of Appeals in her opinion, states that "guilty as charged" means "guilty as

charged in the indictment, and not as inadvertently read by the court" (pp. 6, 7 of opinion).

But the jury had no means of knowing what was charged in the indictment, and relied upon the explanation and instructions of the Court, including the Courts statement that "the Government in this case claims that Paul Douchan over a period of years and because he was harassed by creditors, sought to play fast and loose with the property that he had, that he was the real owner of the Vancouver Hall Apartments, and that in 1930, he was in trouble with a man by the name of Crawford * * *the claim is that Crawford, I think, in 1930, tried to sue the defendant, Douchan. He didn't succeed and then shortly thereafter in 1931, a deed was made out to Mike Prodanov, his brother * * *. It is the claim of the Government that at that time, Prodanov gave a power of attorney back to Paul and that in that way Paul really protected his interest in the property."

The indictment was for concealing bonds, not real estate or an apartment house; and from the Trustee, not from Crawford, a creditor.

Briefly then, it clearly appears that petitioner was indicted for one offense and tried for at least three offenses. This case is controlled by the recent case of *Pierce v. U. S.*, 314 U. S. 306, 362, 86 L. Ed. 226 (1941) where this court said (p. 310):

> "So closely entwined were the TVA and the Government (The United States) in the instructions and the evidence on the various counts that any jury might well have thought a pretense that Pierce was an employee or officer of the TVA violated the statute and have voted for conviction for that reason. This, however, in our view, is incorrect, and constitutes prejudicial error. *Cf. Warszower v. United States,* 312 U. S. 342 * * *

> *Stromberg v. California,* 283 U. S. 359, * * * *Nash v. United States,* 229 U. S. 373 * * *. The statute in effect at the time of the commission of the alleged offenses did not speak of pretenses of acting under authority of corporations owned or controlled by the United States."

In the same way at bar, so closely entwined were the creditors and the Trustee in the instructions and the evidence on the two counts that any jury might well have thought that concealment of assets from creditors violated the statute and have voted for conviction for that reason This we contend was incorrect and constituted prejudicial error. The statute in effect at the time of the commission of the alleged offenses did not speak of concealment from creditors in other than composition proceedings.

In *Hummer v. Commonwealth,* 94 S. E. 157, 122 Va. 826, (1917) a section of the Code created two offenses, *unlawful* cutting and *malicious* cutting. The defendants were indicted for "unlawful" cutting. The Court, in its instruction, read the entire section, including the inapplicable portion respecting "malicious cutting."

Reversing the convictions, the Court, with considerable reason, said (p. 158).

> "We cannot say that the jury was uninfluenced by the action of the court in permitting them to try the prisoners for malicious cutting instead of confining them to the charge of unlawful cutting as set out in the indictment. The commonwealth charged these defendants with an unlawful and felonious but not a malicious act. They had an absolute and constitutional right to be tried accordingly."

So at bar, petitioner had an absolute and constitutional right to be tried in accordance with the unamended statute

which imposed no penalty for concealment from creditors except in composition cases.

> "Due process of law" it is said in *Cooley's Constitutional Limitations,* p. 434 (6th ed.), "in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

People v. Crane, 302 Ill. 217, 134 N. E. 99 (Ill. Sup. Ct. 1922), was a case involving instructions which were subject to the same defect.

This was a prosecution for taking indecent liberties with a child, in which the court's instruction defined the crime in the language of the statute which defined not only the crime with which the defendant was charged, but also the distinct crime of attempting to commit it.

The Court, in reversing the conviction, said (p. 103):

> "Under the instruction given, if the jury thought that the evidence showed an attempt to take indecent liberties but that it did not show the accomplishment of the crime, they might nevertheless have felt justified, under the circumstances, in returning a verdict of guilty under a charge of taking indecent liberties, though the proof showed an attempt only. Counsel for the state argue that it is not error to give an instruction in the language of the statute. This is sometimes true, but when the statute defines more than one crime as in the case in the section referred to, such rule cannot apply, the contemplation of the law is that the jury shall be instructed only covering the crime of which the defendant stands charged, and it is not a sufficient answer to say that the instruction is in substantially the language of the statute. *People*

> *v. Jones,* 263, Ill. 564, 105 N. E. 744. Without discussing further the testimony which is in this opinion set out pertaining to the crime charged, we are of the opinion that the giving of this instruction was prejudicial error."

The rule should be even stronger here where the obnoxious portion of the statute was not inapplicable but had not been enacted into law.

In *Stromberg v. California,* 283 U. S. 359 (1930), this Court held, quoting the fifth headnote as given in 75 L. Ed. 1118:

> "A conviction must be set aside where the verdict of guilty did not specify the ground upon which it rested, and the jury were instructed that their verdict might have been given with respect to any one of the three clauses of the statute the violating of which was charged, and one of the clauses is unconstitutional."

Certainly then a conviction should be set aside where the jury were so instructed that the verdict might have been given with respect to a clause of the statute not yet enacted at the time the offense took place.

The Missouri Supreme Court in *St. Louis v. Slupsky,* 162 S. W. 155, 49 L. R. A. (N. S.) 919, in reversing a conviction under an instruction "that if the defendant used indecent, unseemly, profane, obscene and offensive language in the presence of the Princes (two persons with whom he had the altercation) and if their peace or the peace of either of them was actually disturbed thereby, they should find him guilty" (p. 922 of L. R. A.), whereas the ordinance forbade disturbances of "the peace of others by violent, etc. * * * conduct or carnage * * * etc. calculated to provoke a breach of the peace," said, after pointing out the

additional element of being "calculated to provoke a breach of the peace" (p. 919):

> "It is true that we have no doubt the language attributed to Mr. Slupsky would have filled all the requirements of the ordinance, but it is not within our province to constitute ourselves a jury in a case of this character, and, in the absence of a plea to that effect, find him guilty of an offense other than that upon which the verdict was found.
>
> "The judgment of the Court of Criminal Conviction is reversed, and the cause remanded."

A similar case is *Poole v. State*, 170 S. E. 309 (G. App. 1933), where it was held, quoting the fourth headnote:

> "In prosecution for murder by automobile, instruction embodying invalid part of statute prohibiting speed greater than is 'reasonable and safe' held prejudicial."

In instructing the jury in *Dumbrowski v. State*, 90 S. W. (2) 973, 192 Ark. 263 (1936), the Court made the mistake of reading the statute in its former form when the statute in question had in fact been amended at the time of the offense. This is the converse of the situation at bar, where the Court made the mistake of reading the statute as amended when the unamended statute was applicable.

The change in the law in the Dumbrowski case was less material than at bar, in that (p. 974) "The age of the child in the original act is twelve years, and in the amended act, fourteen years," the crime being non-support.

The Court said simply that "the court erred in reading it to the jury, as the law upon which the charge was based."

In *Coffin v. United States*, 156 U. S. 432, this Court held, quoting the ninth headnote, that

> "that part of the charge given by the court in which the questions of misapplications and of

> false entries are interblended in such a way that it is difficult to understand exactly what was intended, and which implied that the truthful entry of a fraudulent transaction constitutes a false entry within the meaning of the statute, was erroneous."

Judgment was reversed and a new trial granted.

> "We think the language used," said the Court (p. 462) "must have tended to confuse the jury and leave upon their minds the impression * * * that an entry would be false, though it faithfully described an actual occurrence, unless the transaction * * * involved full and fair value for the bank."

In *Jones v. State,* 3 S. W. 478, 22 Tex. App. 680, the Court said (p. 479):

> "The charge copies the whole of article 470 of the Penal Code, which article defines two separate and distinct offenses (*Holden's Case,* 18 Tex. App. 91) with but one of which offenses the defendant was charged. The charge of the Court should have been limited to the *law of the case* * * * the case as made by the indictment and the evidence. *Tooney v. State,* 5 Tex. App. 163."

The conviction was set aside.

See also:

People v. Pereles, 12 P. (2) 1093, 125 Cal. App. (Supp.) 789 (1932).

Jones v. State, 3 S. W. 478, 22 Tex. App. 680.

Poole v. State, 170 S. E. 309, 47 Ga. App. 303 (1933).

People v. Flynn, 38 N. E. (2) 49, 378 Ill. 351 (1942).

It is now well recognized and a traditional principle that appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, where life or liberty is involved, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings:

> *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 84 L. Ed. 1129.
> *United States v. Atkinson,* 297 U. S. 157, 80 L. Ed. 555.

In *Miller v. United States,* 120 Fed. Rep., second series, 968, Judge Huxman of the Circuit Court of Appeals for the Tenth Circuit on pages 972-3 concisely sets forts the principles in this regard which this Honorable Court has established and uniformly sustained:

> "Two of the defendants requested no instruction on character testimony, and none of them excepted to the instruction given by the court. Their failure in this respect does not, however, preclude us from examining the instruction. Where life or liberty is involved, an appellate court may notice and correct a serious error plainly prejudicial, without it being called to the attention of the trial court, *Troutman v. United States,* 10 Cir. 100 F. 2d 628, 634, or even where the error was not preserved for review by proper objection, exception or assignment, *Strader v. United States,* 10 Cir. 72 F. 2d 589, 593; *Williams v. United States,* 10 Cir. 66 F. 2d 868; *Bogileno v. United States,* 10 Cir. 38 F. 2d 584; *Kelly v. United States,* 10 Cir. 76 F. 2d 847.
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> In a criminal case, it is the duty of a court to instruct on all essential questions of law, whether requested or not. *Kinard v. United States,* 68 App. D. C. 250, 96 F. 2d 522, 523; *Kreiner v. United States,* 2 Cir. 11 F. 2d 722, 731.

> The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, includes court procedure, rules of evidence, and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence, which has for its ultimate goal the preservation and protection of the liberty and freedom of the individual citizen."

In closing counsel wishes to emphasize that he believes it self evident that it cannot be determined from the record and proceedings had at the trial of petitioner what specific offense the jury found he had committed, nor the place or vicinity where the same had been performed. Counsel submits under the law and decisions of this Court no person has the right or authority to theorize or speculate that the jury (which obviously was confused by the testimony and instructions given them by the trial court) found the petitioner guilty of the offense charged in the indictment; that petitioner was not indicted by a grand jury for the offenses for which he was tried and further was denied due process of law as guaranteed by the Fifth Amendment to the Constitution for the United States.

VI.

CONCLUSION

In conclusion it is respectfully submitted, that the matters involved herein present substantial, meritorious and important Federal questions, that the Circuit Court of Appeals in this case has decided a Federal question in a way probably in conflict with applicable decisions of this Court, that the decisions of the Circuit Courts of Appeal on the questions here presented are in conflict with each other, that the Circuit Court of Appeals has sanctioned a

proceeding wherein the lower Court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervision and is of such public interest and import as to warrant their review by this Court in the allowance of the Writ of Certiorari, as prayed.

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